

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IRA PERRY,

Plaintiff,

No. C 13-3333 EDL (PR)

v.

ORDER OF SERVICE

E. TOOTELL, et al.,

Defendants.

Plaintiff, a California prisoner proceeding pro se, has filed a second amended civil rights complaint under 42 U.S.C. § 1983, alleging that prison officials at San Quentin State Prison were deliberately indifferent to his serious medical needs.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual

1 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'
2 requires more than labels and conclusions, and a formulaic recitation of the elements of a
3 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief
4 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)
5 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is
6 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained
7 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the
8 framework of a complaint, they must be supported by factual allegations. When there are
9 well-pleaded factual allegations, a court should assume their veracity and then determine
10 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,
11 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
13 elements: (1) that a right secured by the Constitution or laws of the United States was
14 violated, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff alleges that defendants exhibited deliberate indifference to his serious
18 medical needs. Specifically, plaintiff asserts that he has degenerative ligaments and
19 tendons, and suffers from chronic pain. Thus, plaintiff claims that he needs a lower bunk
20 chrono. In April 2012, defendant Dr. Leighton revoked plaintiff's chrono for a lower bunk
21 because plaintiff's medical file was missing. In September 2012, plaintiff's medical file was
22 found, indicating that plaintiff was indeed mobility impaired. However, Dr. Leighton still
23 refused to approve plaintiff's lower bunk chrono. Defendant Dr. Reyes refused to order any
24 necessary tests that would validate plaintiff's need for a lower bunk chrono. Despite
25 plaintiff's twenty-five formal requests to see Dr. Reyes for various medical ailments,
26 defendant Nurse Delacruz screened out plaintiff's requests. Dr. Beaty informed plaintiff
27 that, according to orders from defendant Chief Medical Officer E. Tootell, medical staff was
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1 not permitted to renew chronos or issue any new ones. Liberally construed, plaintiff has
2 stated a cognizable claim that defendants were deliberately indifferent to his serious
3 medical needs.

4 **CONCLUSION**

5 1. The clerk of the court shall mail a Notice of Lawsuit and Request for Waiver of
6 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the
7 second amended complaint and all attachments thereto (docket no. 23), a magistrate judge
8 jurisdiction consent form, and a copy of this order to Chief Medical Officer Elana Tootell, Dr.
9 Doreen Leighton, Dr. Denise C. Albart Reyes, and RN F. Delacruz at San Quentin State
10 Prison. The clerk of the court shall also mail a courtesy copy of the second amended
11 complaint and a copy of this order to the California Attorney General's Office. Additionally,
12 the clerk shall mail a copy of this order to plaintiff.

13 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure
14 requires them to cooperate in saving unnecessary costs of service of the summons and
15 complaint. Pursuant to Rule 4, if defendants, after being notified of this action and asked
16 by the court, on behalf of plaintiff, to waive service of the summons, fail to do so, they will
17 be required to bear the cost of such service unless good cause be shown for their failure to
18 sign and return the waiver form. If service is waived, defendants will be required to serve
19 and file an answer within sixty (60) days from the date on which the request for waiver was
20 sent to them. Defendants are asked to read the statement set forth at the bottom of the
21 waiver form that more completely describes the duties of the parties with regard to waiver
22 of service of the summons. If service is waived after the date provided in the Notice but
23 before defendants have been personally served, the Answer shall be due sixty (60) days
24 from the date on which the request for waiver was sent or twenty (20) days from the date
25 the waiver form is filed, whichever is later.

26 3. In order to expedite the resolution of this case, the court orders as follows:

27 a. No later than sixty days from the date the waivers are sent, defendants
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1 shall file a motion for summary judgment or other dispositive motion. The motion shall be
2 supported by adequate factual documentation and shall conform in all respects to Federal
3 Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports
4 stemming from the events at issue. If defendants are of the opinion that this case cannot
5 be resolved by summary judgment, they shall so inform the court prior to the date their
6 summary judgment motion is due. All papers filed with the court shall be promptly served
7 on plaintiff.

8 b. At the time the dispositive motion is served, defendants shall also serve,
9 on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154
10 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120
11 n.4 (9th Cir. 2003). See *Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012). At that
12 time, defendants shall also submit the magistrate judge jurisdiction consent form.

13 c. Plaintiff's opposition to the dispositive motion shall be filed with the court
14 and served upon defendants no later than twenty-eight days from the date the motion was
15 served upon him.

16 d. Defendants shall file their reply brief no later than fourteen days after the
17 opposition is served upon them.

18 e. The motion shall be deemed submitted as of the date the reply brief is
19 due. No hearing will be held on the motion unless the court so orders at a later date.

20 4. All communications by plaintiff with the court must be served on defendants, or
21 defendants' counsel once counsel has been designated, by mailing a true copy of the
22 document to defendants or defendants' counsel.

23 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
24 No further court order under Federal Rule of Civil Procedure 30(a)(2) is required before the
25 parties may conduct discovery.

26 6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
27 informed of any change of address by filing a separate paper with the clerk headed "Notice
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1 of Change of Address.” He also must comply with the court's orders in a timely fashion.
2 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
3 Federal Rule of Civil Procedure 41(b).

4 **IT IS SO ORDERED.**

5 Dated: July 31, 2014.


ELIZABETH D. LAPORTE
United States Chief Magistrate Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If Defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in Defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If Defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If Defendant files a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.